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ADMITTED TO PRACTICE: NY, MA

**BY EMAIL (cmartucc@nycourts.gov)**

March 15, 2022

Eileen D. Millett  
New York State Unified Court System  
25 Beaver Street  
New York, NY 10004

**Re: Jury Instructions — Response to Feb 16, 2022 Letter**

Dear Ms. Millett:

We write on behalf of Public.Resource.Org (“Public Resource”), in response to your letter dated February 16, 2022, concerning copies of state jury instructions that Public Resource has posted online. As explained in our previous letter dated December 2, 2021, the mission of Public Resource is to enhance public access to government information and public law. In our first letter, we explained that the barriers to access that New York State has put in place with respect to the New York Pattern Jury Instructions (“PJI”) are improper in light of, *inter alia*, the long-standing government edicts doctrine and, in particular, the United States Supreme Court’s decision in the case, *Georgia v. Public.Resource*, 140 S. Ct. 1499 (2020). In your February 16 letter, you suggested that New York maintains a copyright interest in the PJI and is permitted to restrict access thereto. We write to further explain Public Resource’s position and to ask that you please clarify your views on this matter.

### *Edicts of Government Doctrine*

Our previous letter described in some depth the government edicts doctrine, which has emerged from a trio of Supreme Court cases. *See Wheaton v. Peters*, 33 U.S. 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Myers*, 128 U.S. 617 (1888). As a brief review, the three cases established a straightforward rule: because judges are empowered to speak with the force of law, they cannot be the authors of the works they create in the course of

their official duties for the purposes of obtaining copyright. *Georgia*, 140 S. Ct. at 1507. The Court clarified that the relevance of the government edicts doctrine to a work rests on the identity of the author rather than whether the work carries the force of law. *Id.* at 1506. Thus, it is not required to determine which materials constitute “the law,” because the doctrine bars officials responsible for creating the law from being considered authors for copyright purposes of *any work* created in their lawmaking capacity. *Id.*

Under this Supreme Court precedent, copyright protection cannot exist in works that, like the PJI, are (1) created by judges and legislators (2) during their judicial and legislative duties. *Id.* Judges use jury instructions as tools of interpreting the law, and, to this end, are tools used by judges acting in their official capacity. Jury instructions are given by judges to juries to help juries interpret the law to arrive at a legal decision where a judge is not charged with making that decision. The PJI assists judges in rendering legal decisions, and therefore aids judges in their judicial duties.

As we noted in our previous letter, our research indicates that PJI was developed and promulgated by the Committee on Pattern Jury Instructions (the “Committee”). As we also noted, the core of the Committee has always included New York state justices and judges. Since its inception in 1962, several justices and judges have joined the Committee or served as advisors, replacing judges that left the Committee, retired, or passed away. At the time of publishing of the third edition, the Committee consisted of fifteen justices and associate justices, only six of whom were retired.

The PJI is relevant and useful in guiding trial judges in instructing juries clearly. The creators’ experience as judges was a necessary part of their authorship and a crucial element of what gives the PJI the authoritative weight it holds today. Thus, the authors’ dedication to this purpose is indistinct from their judicial duties. In summary, the edicts of government doctrine applies to the PJI, and it is ineligible for copyright protection.

### *Merger Doctrine*

Furthermore, because there are only so many ways to instruct a jury of how to interpret the law, the PJI also falls outside of copyright protection because of the merger doctrine. The merger doctrine states that an “...expression is not protected in those instances where there is only one or so few ways of expressing an idea [if] that protection of the expression would effectively accord protection to the idea itself.” *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991). The simple nature of needing to express the law in plain language so that jurors can understand and apply it to a set of facts means that there are not too many ways to communicate this information to jurors. The more complicated or variable jury instructions become, the more likely it is to be harder for jurors to apply. Even assuming for purposes of argument that the government edicts doctrine did not apply to PJI, it would be ineligible for protection considering copyright’s merger doctrine.

### *Fair Use*

As set out above, we are confident that Public Resource's activities are permissible, because the PJI is ineligible for copyright protection. Without going into detail, we are compelled to note that, even if they were protectable, Public Resource's would be permitted to share the text of the PJI online under copyright's fair use doctrine. 17 U.S. C. § 107. All four fair use factors would weigh in Public Resource's favor if one went beyond the question of copyrightability, in light of (for example) the highly transformative nature of Public Resource's use of the PJI (relevant to fair use factor 1) and the nature of the PJI (relevant to fair use factor 2). Again, we are confident that one need not reach the question of fair use in order to know that Public Resource's conduct is authorized under applicable law.<sup>1</sup>

### *Conclusion*

For these reasons, as well as the reasons stated in our previous letter, we are confident that Public Resource's actions with respect to the PJI and the jury instructions of other states are permissible under copyright law.

We note that, in your February 16 letter, you did not provide any factual or legal basis to support your view to the contrary. Of course, we would welcome the opportunity to discuss this matter with you and to consider and respond to your position if you wish to explain it. Thank you again for your time and attention.

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<sup>1</sup> The fact that PJI is ineligible for protection under the government edits and merger doctrines is true regardless of the extent to which PJI creates revenue for the State of New York. The United States District Court for the Southern District of New York explained that if a code or copyrighted work that aids the state would be created regardless of copyrightability, it is likely that this work is crucial enough to justify a copyright prohibition. *See International Code Council, Inc. v. UpCodes, Inc.*, Slip Copy, 31, 17 (S.D.N.Y., 2020). In *Suffolk*, the Second Circuit weighed two considerations: 1) whether [an] entity or individual who created a work needs an economic incentive to create or has a proprietary interest in creating the work and (2) whether the public needs notice of said work to have notice of the law. *See Cty. of Suffolk, New York v. First Am. Real Est. Sols.*, 261 F.3d 179,194 (2d Cir. 2001). The incentive for uniform, or near uniform, jury instructions that aid judicial consistency and judges in the course of their official duties is enough to justify their creation without necessitating additional economic incentives.<sup>1</sup> Furthermore, because juries need clear explanations of the law to render jury decisions, juries depend on clear explanations of the law through jury instructions like PJI. *See generally International Code Council, Inc. v. UpCodes, Inc.*, Slip Copy, 31, 12 (S.D.N.Y., 2020). Thus, even in the absence of its copyright, the PJI would continue being produced due to its importance to juries and the judicial process.

Nothing herein shall be deemed an admission or waiver of any rights, remedies, defenses, and/or positions of Public Resource, all of which are expressly hereby reserved.

Very truly yours,



Christopher T. Bavitz

cc: David Halperin  
Of Counsel, Public Resource

Cindy Martucci-Kiyar  
New York State Unified Court System